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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
vs.) Case No.
UBER TECHNOLOGIES, INC.;) 17-cv-00939-WHA
OTTOMOTTO, LLC; OTTO TRUCKING LLC,)
Defendants.)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF MICHAEL J. WAGNER
San Francisco, California
Friday, September 22, 2017
Volume I

Reported by:
MARY J. GOFF
CSR No. 13427
Job No. 2714429

PAGES 1-145

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Defendants.)
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HIGHLY CONFIDENTIAL

Videotaped Deposition of MICHAEL J. WAGNER,
Volume I, taken on behalf of Defendants,
at Morrison & Foerster, 425 market Street,
33rd Floor, San Francisco, beginning at
9:34 a.m. and ending at 12:30 p.m., on
September 22, 2017, before MARY GOFF, Certified
Shorthand Reporter No. 13427.

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1 A Yeah, but I -- he thinks -- he thinks my 12:07:51
2 profile is not as good as my straight face. 12:07:53
3 THE VIDEOGRAPHER: What he said. Do you 12:07:57
4 want to stay on or -- we can stay on. 12:07:59
5 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:08:03
6 BY MR. SCHUMAN: 12:08:04
7 Q All right. Good afternoon, Mr. Wagner. 12:08:07
8 A Good afternoon, Mr. Schuman. 12:08:10
9 Q Mr. Wagner, I represent a company called 12:08:14
10 Otto Trucking LLC. Do you know who Otto Trucking 12:08:16
11 is? 12:08:18
12 A I do. 12:08:19
13 Q Who is Otto -- what's your understanding 12:08:20
14 of who Otto Trucking is? 12:08:21
15 A Well, I -- I believe it's a company that's 12:08:23
16 owned by -- principally owned by Mr. Levandowski and 12:08:25
17 Lior. 12:08:32
18 And it is in -- has signed an -- an 12:08:34
19 acquisition of purchase agreement with Uber where 12:08:37
20 it -- it's Uber's discretion to purchase that 12:08:42
21 company between now and sometime in November. And 12:08:45
22 it is a company that is focused on applying LiDAR 12:08:48
23 technology to trucks. 12:08:52
24 Q Do you know whether Otto Trucking has any 12:08:56
25 employees? 12:08:58

3	Q Do you have any understanding as to	12:09:04
4	whether Otto Trucking does any research and	12:09:04
5	development activities?	12:09:07

8 development funds to them, so I -- I would think 12:09:18

12	Q	Okay. You're not offering any opinions in	12:09:29
13		this case as to any damages caused to Waymo specific	12:09:31
14		to Otto Trucking; is that right?	12:09:36

16	Q Okay. And so then your damages -- I'm	12:09:38
17	going to walk through briefly -- not in the level of	12:09:44
18	detail that Uber's counsel did, but I just want to	12:09:46
19	walk through your -- your principal opinions in this	12:09:48
20	case.	12:09:50

24	A	That's fair.	12:10:00
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1 values the accelerated development to -- that Uber 12:10:05
2 was able to achieve through the alleged 12:10:10
3 misappropriation of these nine trade secrets, right? 12:10:13
4 A Yes. 12:10:16
5 Q And -- and your opinion -- that -- we'll 12:10:17
6 call that your first unjust enrichment opinion. 12:10:20
7 That opinion is based on internal Uber 12:10:24
8 documents showing some accelerated development, 12:10:28
9 correct? 12:10:31
10 A That's fair. 12:10:32
11 Q That opinion is not based on any Otto 12:10:34
12 Trucking documents; is that right? 12:10:36
13 A It is not. 12:10:40
14 Q So would you agree with me then that your 12:10:42
15 first unjust -- unjust enrichment theory is not 12:10:45
16 applicable to Otto Trucking? 12:10:48
17 MR. EISEMAN: Objection as to form. 12:10:50
18 A You know, I -- what I would say is that 12:10:51
19 unless Uber exercises its option to purchase Otto 12:10:56
20 Trucking or shares this accelerated depreciation -- 12:11:01
21 or accelerated development with Otto Trucking, then 12:11:04
22 my calculations have nothing to do with your client. 12:11:10
23 Q (BY MR. SCHUMAN) Right. And as we sit 12:11:15
24 here today, you know that Uber has not exercised the 12:11:15
25 option to the purchase Otto Trucking, right? 12:11:18

1 A I -- I don't know that. But those facts 12:11:21
2 have not been brought to my attention. And if it 12:11:23
3 had happened, I fully expect I would be aware of it. 12:11:26
4 Q Right. And the accelerated -- sharing the 12:11:30
5 accelerated development with Otto Trucking, what did 12:11:33
6 you mean by that? 12:11:36
7 A Well, if -- if -- if as a result of Uber 12:11:36
8 accelerating development of LiDAR on their veh -- on 12:11:43
9 their vehicles for their transportation as a 12:11:46
10 service, they -- they're also -- then by Otto 12:11:48
11 Trucking -- and Otto Trucking is going to get into 12:11:51
12 the market one or two years earlier than they 12:11:54
13 otherwise would -- then I think it might be 12:11:58
14 appropriate to your client. But unless those facts 12:12:00
15 occur, what I have calculated has nothing to do with 12:12:03
16 your client. 12:12:05
17 Q All right. And as we sit here today, you 12:12:06
18 do know that those facts that you have just in your 12:12:07
19 last answer summarized have not occurred yet, right? 12:12:10
20 A That's correct. 12:12:13
21 Q Your second unjust enrichment calculation 12:12:14
22 is based on the cost that -- that you have opined 12:12:16
23 Uber saved in its development of autonomous vehicles 12:12:20
24 through alleged use of these nine trade secrets, 12:12:25
25 right? 12:12:29

1 A Yes. 12:12:29

2 Q And again, that's based on Uber documents 12:12:29

3 showing a \$20 million per-month run rate for its R&D 12:12:33

4 program on autonomous vehicles, right? 12:12:39

5 A Yeah, documents and I believe deposition 12:12:42

6 testimony of Mr. Bares. 12:12:44

7 Q Fair. Right. And -- and so your second 12:12:45

8 unjust enrichment calculation is not based on any 12:12:48

9 Otto Trucking-specific evidence; is that fair? 12:12:50

10 A That is fair. 12:12:55

11 Q So your second unjust enrichment 12:12:55

12 calculation, would you agree with me, is not 12:12:57

13 applicable to Otto Trucking? 12:13:00

14 MR. EISEMAN: Objection as to form. 12:13:02

15 A Yes, with the same caveats as I discussed 12:13:02

16 on the first calculation. 12:13:05

17 Q (BY MR. SCHUMAN) Right. So assume -- 12:13:07

18 assume for purposes of this question that Otto 12:13:08

19 Trucking pays Uber some amount of money for the work 12:13:11

20 that Uber employees are -- are doing on 12:13:18

21 autonomous -- the development of autonomous trucks. 12:13:22

22 Have you seen any evidence in the 12:13:25

23 materials you reviewed as to what Otto Trucking's 12:13:28

24 burn rate is for that development? 12:13:32

25 A No. 12:13:35

1 Q Okay. Did -- on the list of materials you 12:13:36
2 reviewed or at least considered is the Brent Schwarz 12:13:39
3 deposition. 12:13:44
4 Do you recall reviewing any portions of 12:13:45
5 Mr. Schwarz's deposition? 12:13:47
6 A I personally do not. 12:13:48
7 Q You have a separate section of your 12:13:55
8 report -- and we were just covering this with Uber's 12:13:58
9 counsel -- unjust enrichment related to Trade Secret 12:14:02
10 No. 90. And I think you have an \$8 million unjust 12:14:04
11 enrichment figure for that; is -- 12:14:08
12 A Yes -- 12:14:10
13 Q -- that right? 12:14:10
14 A -- that's correct. 12:14:11
15 Q And that is -- that -- is that based on 12:14:12
16 any Otto Trucking documents or evidence? 12:14:15
17 A No. 12:14:17
18 Q Does that theory have any applicability to 12:14:18
19 Otto Trucking? 12:14:20
20 MR. EISEMAN: Objection as to form. 12:14:21
21 A You know, I -- no, again, with the same 12:14:22
22 caveats. And -- and I personally believe that my 12:14:26
23 work is only relevant unless client is -- you will 12:14:28
24 have no role at the trial, because your client will 12:14:32
25 be owned by Uber. And I assume Uber's counsel will 12:14:35

1 be representing their interests at that point. But 12:14:38
2 I -- that's only way I see my work as relevant to 12:14:41
3 your client. 12:14:44
4 Q (BY MR. SCHUMAN) Right. So the same 12:14:49
5 caveat -- the same caveats that you're referring to 12:14:49
6 in that answer are -- are the sort of -- we'll call 12:14:51
7 them speculative future possibility that Uber 12:14:54
8 acquires Otto Trucking and shares some of these 12:14:58
9 benefits that you have quantified with Otto Trucking 12:15:01
10 in the future; is -- 12:15:04
11 MR. EISEMAN: Objection. 12:15:05
12 Q (BY MR. SCHUMAN) -- that -- 12:15:05
13 MR. EISEMAN: Objection. Sorry. 12:15:06
14 Q (BY MR. SCHUMAN) Am I -- 12:15:07
15 MR. EISEMAN: Objection as to form. 12:15:09
16 Q (BY MR. SCHUMAN) I didn't ask the question 12:15:09
17 yet. Do you understand that -- do I understand your 12:15:10
18 caveats correctly? 12:15:14
19 MR. EISEMAN: Objection as to form. 12:15:15
20 A Yes. If you took just the 12:15:16
21 word "speculative" out of your question, I would 12:15:18
22 agree with what you said. 12:15:21
23 I mean -- yeah, I don't know whether 12:15:24
24 they're going to get acquired or not. But you know, 12:15:25
25 clearly your -- your client is -- is getting a lot 12:15:27

1 of funds from Uber. Uber is forwarding -- committed 12:15:29
2 to forward a lot of funds to your client. There -- 12:15:32
3 there is a -- a deal done that your client -- client 12:15:34
4 will have to accept and Uber can force on your 12:15:38
5 client, if they want to. 12:15:41
6 I don't know what their mind-set is right 12:15:43
7 now, and I don't know how much development on the 12:15:45
8 truck has been done as to whether Uber believes it's 12:15:47
9 appropriate to purchase your client. 12:15:51
10 So I don't think it's wild speculation, 12:15:54
11 but I clearly do not know whether it will happen or 12:15:56
12 not. But then all the caveats apply. 12:16:00
13 Q (BY MR. SCHUMAN) Right. So fair enough. 12:16:03
14 Taking out the word "speculative." I know we don't 12:16:03
15 like using that word. The caveats you're referring 12:16:06
16 to regarding the applicability of your unjust 12:16:09
17 enrichment damage theories, those caveats are Uber 12:16:12
18 acquires Otto Trucking and that Uber shares some of 12:16:17
19 the technology it's developing using the allegedly 12:16:21
20 misappropriated trade secrets with Otto Trucking; is 12:16:25
21 that right? 12:16:28
22 A That's -- that's -- again, that's my 12:16:28
23 conclusion -- or that would be my opinion as a 12:16:30
24 damage expert. 12:16:33
25 Q If both of those assumptions are true, 12:16:33

1 then your damages opinions -- your unjust enrichment 12:16:36
2 damages opinions may have some applicability to Otto 12:16:39
3 Trucking, correct? 12:16:41
4 MR. EISEMAN: Objection as to form. 12:16:44
5 A That's fair. 12:16:44
6 Q (BY MR. SCHUMAN) You also have a 12:16:49
7 reasonable royalty rate calculation, and that 12:16:52
8 measures the amount that Uber would have agreed to 12:16:55
9 pay Waymo in this hypothetical negotiation set in 12:16:57
10 the -- somewhere in the December 15 -- August -- 12:17:01
11 between December '15 and August 2016 time period, 12:17:04
12 right? 12:17:08
13 A Correct. 12:17:09
14 Q You didn't do any separate calculation of 12:17:09
15 the amount that Otto Trucking would have agreed to 12:17:11
16 pay Waymo at a hypothetical negotiation set during 12:17:15
17 that same time period, correct? 12:17:20
18 A That is accurate. 12:17:22
19 Q Okay. And then for the reasonable royalty 12:17:23
20 calculation that you did, you start with a baseline 12:17:25
21 of Uber's unjust enrichment. And then you adjusted 12:17:28
22 upward based on some analysis you have done of 12:17:32
23 certain of the Georgia-Pacific factors. Namely 4, 12:17:36
24 5, 6, 8, and 11, correct? 12:17:38
25 A Those are the only ones that had any 12:17:42

1 impact on changing the number from the baseline. 12:17:45

2 That is correct. 12:17:47

3 Q And -- and Factor 5 -- this is addressed 12:17:48

4 in your report at paragraphs 399 to 401 -- that -- 12:17:52

5 that factor deals with the commercial relationship 12:17:55

6 between Waymo and Uber and some documents that you 12:17:58

7 referred regarding the -- the potential competitive 12:18:02

8 relationship between those two companies, right? 12:18:08

9 A Yes. 12:18:10

10 Q That analysis in Factor 5 is -- is 12:18:11

11 inapplicable to -- to my client Otto Trucking -- 12:18:13

12 A Yeah -- 12:18:16

13 Q -- correct? 12:18:16

14 A -- as discussed in my report, that is 12:18:16

15 correct. 12:18:19

16 Q Right. And -- and Factor 8 deals with 12:18:20

17 expected future profitability. And you analyzed 12:18:25

18 Waymo's and Uber's projections for profitability of 12:18:29

19 autonomous vehicles. 12:18:36

20 And in your view, that factor counseled in 12:18:36

21 favor of some enhancement to the baseline for the 12:18:38

22 reasonable royalty calculation, right? 12:18:42

23 A That's fair. 12:18:44

24 Q Okay. And -- and you were working with 12:18:45

25 Waymo and Uber projections there, not any 12:18:48

1 projections from Otto Trucking, right? 12:18:51

2 A Correct. I don't believe I have seen any 12:18:52

3 projections for your client -- 12:18:54

4 Q Right. 12:18:56

5 A -- and so I poss -- I could not have 12:18:56

6 possibly considered them. 12:18:58

7 Q Okay. You answered my next question, so 12:18:59

8 that'll make us go a little faster. 12:19:01

9 Factor 11 talks about the extent of the 12:19:04

10 use of the invention. This is addressed at 12:19:06

11 paragraphs 424 and 428 of your report. And again, 12:19:09

12 you find that that factor pushes the base -- the -- 12:19:12

13 the reasonable royalty baseline up a little bit 12:19:13

14 because of your assumptions based on the work of 12:19:17

15 others that -- that Uber has used these trade 12:19:21

16 secrets, right? 12:19:24

17 A Yes. 12:19:25

18 Q And you -- you have not done or are -- at 12:19:28

19 least -- have -- have you seen any evidence of any 12:19:30

20 use of any of these trade secrets by my client, Otto 12:19:33

21 Trucking? 12:19:36

22 MR. EISEMAN: Objection as to form. 12:19:37

23 A I have not. 12:19:37

24 Q (BY MR. SCHUMAN) And so your analysis of 12:19:41

25 Factor 11 is inapplicable to my client, Otto 12:19:42

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1 Trucking, right? 12:19:46

2 MR. EISEMAN: Objection as to form. 12:19:47

3 A Based on the information that I have at 12:19:48

4 this time, that is correct. 12:19:50

5 Q (BY MR. SCHUMAN) Okay. Mr. Wagner, if the 12:19:53

6 jury finds that -- and this is the hypothetical, so 12:19:55

7 it's -- follow me here. If the jury finds that Uber 12:19:57

8 and Ottomotto -- strike that. I'm going to start 12:20:01

9 over. 12:20:05

10 Hypothetical: If at trial in this case 12:20:05

11 the jury finds in favor of Uber -- Uber and 12:20:06

12 Ottomotto -- so a defense verdict for them -- but 12:20:10

13 against Otto Trucking on liability, what's your 12:20:13

14 opinion as to the damages that Waymo would be 12:20:17

15 entitled to as to my client, Otto Trucking? 12:20:20

16 MR. EISEMAN: Objection as to form. 12:20:23

17 A I would need more facts to know if there's 12:20:24

18 any relevance of what I have done would apply to 12:20:25

19 your client in that hypothetical. 12:20:28

20 Q (BY MR. SCHUMAN) So as you sit here today 12:20:30

21 based on the work you have done so far up to and 12:20:32

22 including today, you don't have an opinion of what 12:20:35

23 damages Waymo would be entitled to under that 12:20:38

24 hypothetical verdict -- 12:20:40

25 MR. EISEMAN: Objection. 12:20:41

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1 Q (BY MR. SCHUMAN) -- is that fair? 12:20:41

2 MR. EISEMAN: Objection as to form. 12:20:43

3 A I do not. 12:20:43

4 Q (BY MR. SCHUMAN) In -- in response to some 12:20:44

5 of the questions you got from Uber's counsel, you -- 12:20:50

6 you mentioned that you personally spent 12:20:55

7 approximately 64 hours total working on -- working 12:20:58

8 on your opinions in this case. Obviously, your 12:21:01

9 staff spent many more hours than that. 12:21:04

10 Approximately what percentage of your 12:21:06

11 64 hours, Mr. Wagner, did you spend focusing on 12:21:09

12 calculating damages specific to my client, Otto 12:21:14

13 Trucking? 12:21:16

14 A Zero. 12:21:17

15 Q Just bear with me a second. 12:21:25

16 A But I could -- the approximate -- it's 12:21:27

17 exactly 64.0 hours through September 15. And it's 12:21:30

18 been 13.4 hours since then before today. 12:21:36

19 Q I would -- 12:21:39

20 A -- between September 15 and today. 12:21:40

21 Q In response to some questions from Uber's 12:21:44

22 counsel, I think you made clear that your damages 12:21:45

23 are based on Uber's use of -- alleged use of the 12:21:46

24 trade secrets in its development of its autonomous 12:21:53

25 vehicles. 12:21:56

1 If the evidence at trial shows that my 12:22:01
2 client, Otto Trucking, has not used any of those 12:22:04
3 trade secrets, would you agree with me that your 12:22:07
4 opinions are irrelevant to Otto Trucking? 12:22:10
5 MR. EISEMAN: Objection as to form. 12:22:13
6 A I'm not giving you a legal opinion. But 12:22:16
7 as -- my judgment as a damage expert, you are 12:22:17
8 correct. 12:22:20
9 Q (BY MR. SCHUMAN) You mentioned that you 12:22:29
10 had documents in this case from Uber with its own 12:22:31
11 modeling of the benefits of -- of -- well, let me -- 12:22:38
12 let me ask it -- strike that. Let me start that 12:22:44
13 question again. 12:22:47
14 Do you remember some testimony you gave in 12:22:48
15 response to Uber's counsel where you characterized 12:22:49
16 some of the information you got from -- that you 12:22:52
17 were able to review from Uber as the Rosetta Stone 12:22:55
18 in your field? 12:22:57
19 Do you remember that -- 12:22:59
20 A I -- 12:22:59
21 Q -- testimony? 12:22:59
22 A -- do remember that. 12:23:00
23 Q And -- and what is the information again 12:23:01
24 that you characterize as being the Rosetta Stone in 12:23:03
25 your field? 12:23:05

1 A Well, you know, I -- well, let me -- let 12:23:06
2 me give you an example of another case that I 12:23:07
3 testified in last year in a similar fact situation 12:23:10
4 of this case where there's no product in the market 12:23:13
5 yet. There's regulatory approvals that need to be 12:23:16
6 done that weren't done yet; that there would be no 12:23:20
7 commercialization for years into the future. And I 12:23:21
8 had the business plans of the company that took the 12:23:24
9 trade secrets. 12:23:30

10 Now, there they provided me the model, and 12:23:31
11 they never made a calculation of what the impact 12:23:36
12 would be on them to accelerate the development by 12:23:39
13 any amount of time. I had to get into their model, 12:23:43
14 understand the logic, and make that calculation 12:23:46
15 myself. 12:23:47

16 In this case I have the same thing in that 12:23:49
17 I have projections done at the time of the alleged 12:23:51
18 theft by the party who was alleged to have taken the 12:23:55
19 trade secrets. 12:23:59

20 But they have even gone to the next step 12:24:01
21 of actually quantifying the impact of acceleration, 12:24:04
22 and so that's why I say it's the Rosetta Stone. 12:24:07
23 Normally I have to do more work than I did in this 12:24:09
24 case, but Uber has done it for me. 12:24:12

25 Q Right. And have you seen any similar 12:24:17

1 documents from my client, Otto Trucking? 12:24:20

2 A I knew that was next question. The answer 12:24:23

3 is no. And you're closing the loop. 12:24:25

4 MR. SCHUMAN: Why don't we take a 12:24:32

5 two-minute break. I don't think I have anything 12:24:33

6 more, but why don't we just -- 12:24:36

7 MR. BERRY: I actually have a couple of 12:24:36

8 questions. 12:24:38

9 MR. SCHUMAN: Well, I'm not sure I'm done 12:24:38

10 yet. I just want to -- 12:24:40

11 MR. BERRY: Okay. 12:24:41

12 MR. SCHUMAN: -- take a two-minute break 12:24:41

13 and make sure. And then if you have something else. 12:24:41

14 MR. BERRY: Okay. 12:24:44

15 MR. SCHUMAN: -- you guys can take that 12:24:45

16 up. 12:24:46

17 THE VIDEOGRAPHER: It's 12:24 p.m. We're 12:24:47

18 going off the record. 12:24:49

19 (A break was taken from 12:24 p.m. to 12:24:51

20 12:28 p.m.) 12:25:12

21 THE VIDEOGRAPHER: We are back on the 12:28:09

22 record. It's 12:28 p.m. 12:28:09

23 Q (BY MR. SCHUMAN) Mr. Wagner, did either 12:28:15

24 the Quinn firm or Waymo ask you or your firm to 12:28:17

25 prepare any damages opinions specific to my client, 12:28:22

1 Otto Trucking? 12:28:27

2 A I don't recall that specific instruction. 12:28:28

3 Q As you sit here today, do you plan to do 12:28:31

4 any work between now and the time of trial on 12:28:33

5 developing opinions regarding damages specific to my 12:28:38

6 client, Otto Trucking? 12:28:45

7 A No. 12:28:46

8 MR. SCHUMAN: Okay. I have no further 12:28:47

9 questions for you. Thank you for your time. 12:28:49

10 A Thank you. 12:28:52

11 MR. EISEMAN: Mr. Berry, what do you 12:28:56

12 consider this -- these questions? Do you consider 12:28:58

13 them to be redirect? 12:28:59

14 MR. BERRY: I haven't even thought about 12:29:02

15 how to characterize it. 12:29:03

16 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:29:08

17 BY MR. BERRY: 12:29:12

18 Q Mr. Wagner, I had a -- a couple of 12:29:12

19 questions. The first is: Your opinions in this 12:29:13

20 case assume that Uber is going to go to market and 12:29:15

21 commercialize its AV technology using the Fuji 12:29:19

22 LiDAR, right? 12:29:23

23 MR. EISEMAN: Objection as to form. 12:29:24

24 A I -- again, I -- I think that's assumed. 12:29:24

25 But again, that's a better question for 12:29:27

1 I, MARY J. GOFF, CSR No. 13427, Certified
2 Shorthand Reporter of the State of California,
3 certify;

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth, at
6 which time the witness declared under penalty of
7 perjury; that the testimony of the witness and all
8 objections made at the time of the examination were
9 recorded stenographically by me and were thereafter
10 transcribed under my direction and supervision; that
11 the foregoing is a full, true, and correct
12 transcript of my shorthand notes so taken and of the
13 testimony so given;

14 That before completion of the deposition,
15 review of the transcript () was (XX) was not
16 requested: () that the witness has failed or
17 refused to approve the transcript.

18 I further certify that I am not financially
19 interested in the action, and I am not a relative or
20 employee of any attorney of the parties, nor of any
21 of the parties.

22 I declare under penalty of perjury under the
23 laws of California that the foregoing is true and
24 correct, dated this 23rd day of September, 2017.

25 

MARY J. GOFF, CSR No. 13427